

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

JOHN TRACY JOSEY,
Petitioner,
VS.

RICK THALER, Director,
T.D.C.J., Correctional
Institutions Division,
Respondent.

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CIVIL ACTION NO. 4:11-cv-633-A

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED

APR 30 2012

CLERK, U.S. DISTRICT COURT

FINDINGS, CONCLUSIONS AND RECOMMENDATION OF THE
UNITED STATES MAGISTRATE JUDGE AND NOTICE AND ORDER

In this case, defendant/appellant John Josey has filed a motion for leave to proceed *in forma pauperis* on appeal. Resolution of the motion was referred to the United States Magistrate Judge pursuant to the provisions of 28 U.S.C. § 636(b). The findings, conclusions and recommendation of the United States Magistrate Judge are as follows:

FINDINGS AND CONCLUSIONS:

A. NATURE OF THE CASE

This case is on appeal from the Court's dismissal of John Tracey Josey's petition under 28 U.S.C. § 2254.

B. PARTIES

John Tracy Josey is the petitioner. The respondent is Director Rick Thaler, TDCJ, Correctional Institutions division.

C. LEGAL ANALYSIS

On February 24, 2012, petitioner/appellant Josey filed an application/motion for leave to proceed *in forma pauperis* (IFP) on appeal. The Court has referred the motion to the undersigned. In *Donaldson v. Ducote*, 373 F.3d 622, 624-25 (5th Cir. 2004), the United

States Court of Appeals for the Fifth Circuit *sua sponte* found that it did not have jurisdiction to review a magistrate judge's order denying an appellant's motion for leave to proceed *in forma pauperis* on appeal and certifying that the appeal was not taken in good faith. Appellant had not consented to the magistrate judge's ruling on his right to appeal *in forma pauperis*, and he had not been afforded the opportunity to object to the magistrate judge's recommendation. *Id.* at 624-25. Thus, the court of appeals remanded the case to the district judge "for the limited purpose of reviewing the magistrate judge's certification that [appellant's] appeal is not taken in good faith and entering an appropriate order." *Id.* at 625. Guided by the logic of *Ducote*, the undersigned has considered Josey's motion for leave to proceed *in forma pauperis* on appeal through this report and recommendation procedure, with time provided for appellant to submit objections.

The motion for leave to proceed *in forma pauperis* on appeal pursuant to 28 U.S.C. § 1915 should be denied because applicant John Tracy Josey has not provided a certificate of inmate trust account in spite of repeated extensions, and in spite of orders warning him that failure to provide the certificate of inmate trust account could result in the denial of his motion to proceed *in forma pauperis* on appeal.

In this regard, the undersigned first noted, by order March 3, 2012, that appellant had not provided any information about his inmate trust account, and by order, directed him to supply that information. Then, on both March 28, 2012 and again on April 10, 2012, the

undersigned issued orders denying intervening motions filed by Josey regarding seeking a waiver of the filing fee. But, Josey repeatedly failed to provide a certificate of inmate trust account. The Court did grant him two extensions of time, and ultimately extended the time to supply the account certificate until April 16, 2012. Josey did not timely comply, but has yet again filed another motion for leave of court for extension of time to submit a certificate of inmate trust account. That motion sought an extension until April 26, 2012 to submit a certificate of inmate trust account. That date has now passed, and Josey has not filed an inmate account certificate.

The undersigned will therefore recommend that both the motion for leave of Court for an extension of time and the motion to proceed in forma pauperis be denied.

RECOMMENDATION

It is therefore RECOMMENDED that petitioner John Tracy Josey's motion for leave of Court for an extension of time [docket no. 37] and Josey's February 24, 2012, motion/application to proceed in forma pauperis on appeal [docket no. 28] be DENIED.

NOTICE OF RIGHT TO OBJECT TO PROPOSED
FINDINGS, CONCLUSIONS AND RECOMMENDATION
AND CONSEQUENCES OF FAILURE TO OBJECT

A copy of this report and recommendation shall be served on all parties in the manner provided by law. Any party who objects to any part of this report and recommendation must file specific written objections within 10 days after being served with a copy. See 28 U.S.C. §

636(b)(1); Fed. R. Civ. P. 72(b). The court is extending the deadline within which to file specific written objections to the United States Magistrate Judge's proposed findings, conclusions, and recommendation until May 21, 2012. In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's report and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific. Failure to file by the date stated above a specific written objection to a proposed factual finding or legal conclusion will bar a party, except upon grounds of plain error or manifest injustice, from attacking on appeal any such proposed factual finding and legal conclusion if it has been accepted by the United States District Judge. *See Douglass v. United Services Auto Ass'n*, 79 F.3d 1415, 1428-29 (5th Cir. 1996) (en banc).

ORDER

Under 28 U.S.C. § 636, it is ORDERED that Plaintiff is granted until May 21, 2012 to serve and file written objections to the United States Magistrate Judge's proposed findings, conclusions and recommendation.

It is further ORDERED that the above-styled and numbered action, previously referred to the United States Magistrate Judge, be and is hereby, returned to the docket of the United States District Judge.

SIGNED April 30, 2012.


JEFFREY L. CURETON
UNITED STATES MAGISTRATE JUDGE